 ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 9 of the Communications Act	)	MD Docket No. 94-19
	)	
	)	
Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year	)	
	)	
	)	

To: The Commission

COMMENTS

Dennis C. Brown and Robert H. Schwaninger, Jr. ("Brown and Schwaninger" or "we"), on behalf of various clients in the Private Radio Services and in the Common Carrier Radio Services respectfully file our Comments in the above captioned proceeding. In support of our position, we show the following.

The Commission is not authorized to create one of the categories of fees which it proposed to create, is not authorized to collect certain of the fees which it proposes to collect, and is not authorized to collect fees from certain of the licensees from which it proposes to collect them. Accordingly, the Commission should revise its proposed rules before adoption.

For, Nay, Three Would Be Too Many

Congress established two, and only two, categories of fees, namely, "fees in large amounts", and "fees in small amounts". In the case of fees in large amounts, Section 9(f) of the Communications Act authorizes the Commission to "permit payment by installments". In

the case of fees in small amounts, Section 9(f) of the Act requires the Commission to pay the fee "in advance for a number of years not to exceed the term of the license held by the payor". Congress did not authorize the Commission to establish any third category of "standard fee", which the Commission proposed to collect annually.

By the familiar principle of statutory interpretation, *inclusio unis est exclusio alteria,* Sutherland's Statutory Construction §47.23 at 216 (1992), Congress' enumeration of two categories of fees eliminated the possibility that Congress had authorized the Commission to establish any third category. Therefore, the Commission cannot collect any fee other than a fee in a large amount on an annual installment basis or a small fee collected in advance for a number of years. Rather, the Commission's authority is limited to 1) determining that the fee is in a large amount and establishing an installment plan, and 2) determining that a fee is in a small amount and collecting the fee in advance for a number of years not to exceed the term of the license which is held.

Had Congress intended to authorize the Commission to adjust a category of "standard" fees from time to time, and impose such adjusted fees on persons who were already enjoying the term of a license, it would have done so.[1] However, in the absence of any evidence,

[1] Whether Congress could constitutionally do so is the subject of cases currently pending before the Supreme Court. However, since the Commission did not so authorize the Commission, that constitutional question need not detain the Commission.

whatsoever, that Congress intended such a plan, the Commission is without authority to establish the proposed standard fee category.

Lacking authority to establish the proposed standard fee category, the Commission is not, for example, authorized to charge a Public Mobile licensee $60 in 1994, $75 in 1995, $90 in 1996, and so forth. Rather, the Commission's authority is limited to determining that the annual fee to be charged to the grantee of a new Public Mobile licensee and which has 1000 subscribers is $60, and to bill that licensee for $60 times the number of years in the term of the license.

Private Radio Bureau

The Commission has no authority to charge regulatory fees based on whether a person is authorized to use a radio frequency exclusively. The Statutory Schedule of Regulatory Fees (the Statutory Schedule) established fees on a per license basis, without reference to whether the licensee has exclusive use of one or more of the frequencies on which operation is authorized by the license. Had Congress intended to impose the Regulatory Fee on the basis of whether a license granted exclusive use of one or more frequencies, it would have imposed the fee on a per frequency basis. Since, however, the Statutory Schedule is based on the existence of a license, without any reference to exclusive use of a frequency,[2] the Commission's analysis at paragraphs 48, 50, and 57 of its NPRM is in error, and the Commission should correct its

[2] The only reference to a frequency in the portion of the Statutory Schedule which relates to the Private Radio Bureau is whether the license authorizes service by a base station or an SMRS station above 470 MHz.

analysis by beginning with the question of whether the licensee shares with anyone else the service which is authorized by its license. The Schedule established two categories of persons who are subject to the collection of fees, namely, 1) persons whose license is for a base station or an SMRS station above 470 MHz, and who use the service authorized by their license exclusively; and 2) any person who shares with someone else the service for which it has been granted a license.

The reason that the "Schedule of Regulatory Fees does not list specific Private Radio services under the category of 'shared use services'," NPRM at para 22, is that there is no Private Radio Service, *e.g.*, the Taxicab Radio Service, which is *per se* a shared use service.[3] Given Congress's determination that the Commission is to collect the Regulatory Fee on a per license basis, the Commission must look to the use made of that license by the specific licensee to determine whether the licensee shares with anyone else the service which is authorized by the license. If the licensee does share use of the service provided under its license, whether on a commercial basis or on a not-for-profit basis, then the applicable annual fee is $7. If the licensee makes exclusive use of the service authorized by the license, *i.e.*, does not share the service provided under the license with anyone else, and the station is a base or SMRS station above 470, then the applicable annual fee is $16.

[3] Nor is there any Radio Service which enjoys *per se* exclusive use of a channel. The licensee of an SMR conventional station may or may not have exclusive use of the frequency for which it is authorized.

In its Report and Order in PR Docket No. 92-78, _____ FCC Rcd. _____ (FCC 92-444 Released October 2, 1992), the Commission explained that "a station is considered shared when end users not licensed to operate a base station are capable of remotely operating the base station for their own purposes pursuant to the base station licensee's authorization. 47 C.F.R. §90.179. *See also* Telocator Network of America v. FCC, 761 F.2d (D.C. Cir. 1985)," *id.* at n. 1. The Commission's definition of shared use would appear to encompass the licensed activity of most SMRS stations. Accordingly, only if a person licensed for operation of a base station or an SMRS station above 470 MHz uses the station, in fact, solely to meet its own communications needs and does not permit anyone else to remotely operate the base station pursuant to his license is operation under that license exclusive to the licensee. In all other cases, it is well established that operation of the station is not exclusive. Therefore, the lower fee level should be applicable.

A few examples will illuminate the distinctions made by the Statutory Schedule:

1) Licensee holds a license for an SMRS station above 470 MHz. Licensee uses the station to provide commercial communications service to eligible persons and permits persons who do not hold licenses for the base station to operate the base station remotely. Since the licensee shares use of the service provided under the SMRS license with other persons, the applicable annual fee is $7.

2) Licensee holds a license for an SMRS station above 470 MHz. Licensee has no customers, but does use the station to meet its own communications needs. Since the licensee

does not share use of the service provided under the license with any other person, the applicable annual fee is $16.

3) Licensee holds a license for a Special Industrial station operating in the 450-470 MHz band. Licensee shares use of the licensed station with another eligible person on a non-profit cooperative cost-sharing basis. Since the licensee makes shared use of the service for which it holds a license, the applicable annual fee is $7.

4) Licensee holds a license for a Taxicab base and mobile station in the 470-512 MHz band. Licensee does not share use of the licensed station with anyone else. Since the licensee makes exclusive use of its license and the license authorized operation above 470 MHz, the applicable annual fee is $16.

5) Licensee holds a license for a class FB4 station (a community repeater) in the 470-512 MHz band. Licensee does not share with anyone else the service which is authorized under its license. Therefore, the applicable annual fee for the exclusive use service provided by this base station above 470 MHz is $16.

6) Licensee holds a license for a Business Radio Service station operating in the VHF high band. Licensee does not share use of the service authorized by the license with anyone else. Licensee makes exclusive use of the service for which it holds the license, but since the station is not above 470 MHz, the licensee is not subject to any Regulatory Fee.

In determining whether a specific licensee is subject to collection of a regulatory fee, the touchstones provided by the Statutory Schedule are 1) whether the license authorizes operation of a base or SMRS station above 470 MHz and whether the licensee shares the service which is authorized by its license with anyone else, and 2) whether the license authorizes operation of any station and the licensee shares the service which is authorized by its license with anyone else. If the service for which the licensee is authorized does not pass one of those two tests, the Statutory Schedule does not provide for the collection of any Regulatory Fee.

You Lie Down With Licenses, You Wake Up With Fees

At paragraph 36 of its NPRM, the Commission proposed "to require persons holding lifetime restricted radiotelephone and radio operator licenses or permits for commercial use to pay a one-time regulatory fee of $105 to cover the entire lifetime license or permit term". However, the Budget Act provides the Commission no authority, whatsoever, to collect such a fee. The Statutory Schedule does not specify any fee, whatsoever, for the regulation of radio operators. Therefore, the Commission has no authority for the proposed fee and should withdraw the proposal.

Were the Commission to collect such a fee, it would have to take into account that it has been authorized to collect fees on only an annual basis. On an actuarial basis, one can predict the number of annual periods which a person is likely to live, but it is obvious that a person aged 26 who holds a General Radio Telephone Operator License (Lifetime Permit) is likely to live longer than a person receiving the same grade of license who is age 47 at the time that the

Commission collects a one-time fee to cover the entire lifetime license. Accordingly, the Commission would have to make a reasonable prediction as to the lifetime of each licensee or permittee and set the fee according to the age of the licensee or permittee. In the absence of the requisite factual basis for the setting of the level of the proposed fee, the proposal is clearly unlawful.

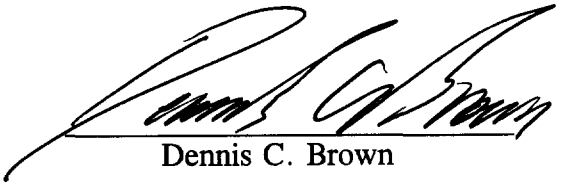
Legal Tender, Legal True

At paragraphs 37 through 42 of its NPRM, the Commission discussed a variety of means by which one might pay the regulatory fee. The Commission is to be applauded for its consideration of such methods as electronic payment of the fee. However, the Commission proposed one clearly unlawful requirement. At footnote 49, the NPRM stated that the Commission "would also continue our policy of not accepting instruments other than cashier's checks for payors who are notified that other payment methods are unacceptable." Regardless of whether a payor is making a first-time payment of a regulatory fee or has been delinquent in the past, the Commission should take into account that 31 U.S.C. §5103 (the "Legal Tender Statute") provides that "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes and dues." Accordingly, in taking final action in this matter, the Commission should acknowledge that it will accept United States coins and currency in payment of the regulatory fee by any person.

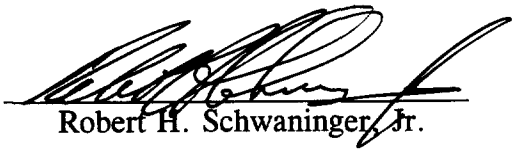
Conclusion

For all the foregoing reasons, we respectfully request that the Commission adopt rules consistent with the suggestions contained herein.

Respectfully submitted,



Dennis C. Brown



Robert H. Schwaninger, Jr.

BROWN AND SCHWANINGER
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: April 7, 1994